695H (51) (47)

Nos. 05-908 & 05-915

FILED
OCT 10 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF FOR HON. CLIFFORD L. ALEXANDER, JR., LT. GEN. JULIUS W. BECTON, JR., HON. LOUIS E. CALDERA, ADM. ARCHIE CLEMINS, HON. WILLIAM S. COHEN, HON. JOHN H. DALTON, HON. RUDY F. DELEON, HON. F. WHITTEN PETERS, HON. JOE R. REEDER, AND HON. TOGO D. WEST, JR. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

JONATHAN S. FRANKLIN*
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE HISTORY AND EXPERIENCE OF THE U.S. MILITARY SHOWS THE IMPORTANCE OF VOLUNTARY MEASURES TO PROMOTE RACIAL INTEGRATION IN PUBLIC EDUCATION.	5
A. Since World War II, the Military Has Engaged in Voluntary Efforts to Integrate Both Its Ranks and the Education Provided to Dependent Children	7
B. The DoD Schools Demonstrate the Significant Benefits of Integrated Education	11
II. PROMOTING AND MAINTAINING RACIAL INTEGRATION IN ELEMENTARY AND SECONDARY SCHOOLS IS A COMPELLING GOVERNMENTAL INTEREST	15
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
***CASES*:**	
Brown v. *Board of Educ.*, 347 U.S. 483 (1954)..	*passim*
Freeman v. *Pitts*, 503 U.S. 467 (1992)	17
Grutter v. *Bollinger*, 539 U.S. 306 (2003).....	*passim*
McFarland v. *Jefferson Co. Pub. Schs.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004)	15
Milliken v. *Bradley*, 418 U.S. 467 (1974).....	17
Parents Involved in Cmty. Schs. v. *Seattle Sch. Dist. No. 1*, ...	15
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).....	16, 17
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).....	16, 17
***LEGISLATIVE MATERIALS*:**	
H.R. 8460, 88th Cong. (1963).....	8
100 Cong. Rec. 8412 (1950)	8
100 Cong. Rec. 9074 (1950)	8
Congressional Budget Office, *Budget Options for National Defense* (Mar. 2000).....	11
***ADMINISTRATIVE MATERIALS*:**	
Air Force Letter 35-3 (May 11, 1949).....	9
Dep't of Def. Directive 1350.2 (Aug. 18, 1995).	9
Dep't of Def. Directive 5120.36 (Jul. 26, 1963).	8
Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948)	7, 8

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Memorandum from Charles Wilson, Secretary of Defense, to Joint Chiefs (Jan. 12, 1954)..... 10

Army Families Online, *Army Well Being: Education and Development* (http://www.armyfamiliesonline.org)..... 6

Dept. of Def., *Population Representation in the Military Services Fiscal Year 2004* (May 2006) (http://www.defenselink.mil/prhome/poprep2004/download/2004report.pdf)..... 9

Dept. of Def. Educ. Activity, *An Overview* (June 2004) (http://www.dodea.edu/aar/2004/students.htm)..... 11

Dept. of Def. Educ. Activity, *Budgets* (2000) (http://www.dodea.edu/aar/2000/budget.htm). 13, 14

Dept. of Def. Educ. Activity, *Facts 2003* (http://www.dodea.edu/communications/dodeafacts.htm)..... 11

Dept. of Def. Educ. Activity, *National Assessment of Educational Progress 2000-2003 Score Rankings* (http://www.dodea.edu/aar/2004/NAEP.htm)..... 12, 13

Dept. of Def. Educ. Activity, *News Releases* (Oct. 28, 2005) (http://www.dodea.edu/communications/news/releases/102805_math.htm *and* http://www.dodea.edu/communications/news/releases/102805_reading. htm)..... 13

U.S. Air. Force, *Air Force Strategic Plan 2006-2008* (http://af.mil/shared/media/document/AFD-060919-008.pdf)..... 6

U.S. Marine Corps, *Education* (http://www.usmc-mccs.org/education/fl/index.cfm)..... 6

TABLE OF AUTHORITIES—Continued

Page

U.S. Navy, *Staying the Course: A Commitment to Children* (http://www.news.navy.nil/search/display.asp?story_id=8685) 6, 7

Charles Brown, *Relatively Equal Opportunity in the Armed Forces: Impacts on Children in Military Families* (Draft 2006) 11, 12, 14

Morris J. MacGregor, Jr., *Integration of the Armed Forces* (1980) 7, 8, 9, 10, 18

Bernard McNalty & Morris MacGregor, *Blacks in the Military—Essential Documents* (1981) .. 8, 10

Gary Orfield & John T. Yun, *Resegregation in American Schools* (1999) 12

Fredreka Schouten, *Military Schools Producing Army of Solid Performance*, USA Today (Mar. 31, 2004) 14-15

Claire Smrekar & Debra Owens, *It's a Way of Life For Us: High Mobility and Achievement in Department of Defense Schools*, 72 J. Negro Educ. 173 (Winter 2003) 13-14

Claire Smrekar et al., *March Toward Excellence: School Success and Minority Student Achievement in Department of Defense Schools* (Sept. 2001) 11, 12, 13, 14

IN THE

Supreme Court of the United States

Nos. 05-908 & 05-915

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,

Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits

BRIEF FOR HON. CLIFFORD L. ALEXANDER, JR., LT. GEN. JULIUS W. BECTON, JR., HON. LOUIS E. CALDERA, ADM. ARCHIE CLEMINS, HON. WILLIAM S. COHEN, HON. JOHN H. DALTON, HON. RUDY F. DELEON, HON. F. WHITTEN PETERS, HON. JOE R. REEDER, AND HON. TOGO D. WEST, JR. AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are former high-ranking leaders of the Department of Defense ("DoD") and the armed forces.[1] They are deeply interested in this case, not only because voluntary integrative measures have been critical to the military's fulfillment of its core missions, but also because the military's experience with its own highly integrated schools has shown the significant benefits that accrue to children from a racially diverse educational environment.

Amici are concerned about the negative consequences that would flow from a broad ruling that maintaining and promoting racial integration in public elementary and secondary schools is not a compelling governmental interest. The integration of the military, and the expansion of the integrated schools operated by the military, were in large part voluntary measures undertaken to ensure a cohesive fighting force and to secure for military dependents the significant educational and other benefits of integrated schools later recognized by this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Both measures have proved overwhelmingly successful. Not only has an integrated military increased our national security immeasurably, but the military's schools have among the highest levels of both racial diversity and minority educational achievement in the Nation.

Amici believe that the experience of these schools, as well as the general experience of the military with voluntary integration, reinforces a critical premise of *Brown* and its progeny—that maintaining and promoting a racially integrated educational environment is a compelling governmen-

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

tal interest. Amici therefore urge the Court to uphold this central tenet of *Brown*, and reject the notion advanced by petitioners that this interest is anything less than compelling.

The following are brief biographies of the individual *amici curiae*:

Honorable Clifford L. Alexander, Jr. was Secretary of the Army from 1977 to 1981. He was previously Chairman of the Equal Opportunity Employment Commission, Special Consultant to the President on Civil Rights, and Foreign Affairs Officer of the National Security Council.

Lieutenant General Julius W. Becton, Jr. served in the U.S. Army for 40 years. He also served five years as president of Prairie View A&M University, and subsequently served as Superintendent of the Washington, D.C. Public Schools.

Honorable Louis E. Caldera, a West Point graduate and former Army officer, was Secretary of the Army from 1998 to 2001. He was previously Managing Director and Chief Operating Director of the Corporation for National and Community Service, which supports Americorps, the National Service Corps, and Learn and Serve America. He is also a former President of the University of New Mexico.

Admiral Archie Clemins, retired 4-star, served as Commander in Chief, U.S. Pacific Fleet, from 1996-99. The U.S. Pacific Fleet is the world's largest combined-fleet command.

Honorable William S. Cohen served as the 20th Secretary of Defense from 1997-2001. He also served as U.S. Senator from Maine from 1979-1997, and chaired the Armed Service Committee's Seapower and Force Projection Subcommittee.

Honorable John H. Dalton, a Naval Academy graduate and Naval officer, was Secretary of the Navy from 1993-98.

Honorable Rudy F. deLeon was Deputy Secretary of Defense from 2000-2001. He previously served as Under

Secretary of Defense for Personnel and Readiness, Under Secretary of the Air Force, and Special Assistant to the Secretary of Defense.

Honorable F. Whitten Peters was Secretary of the Air Force from 1999-2001. He previously served as Acting Secretary and Under Secretary of the Air Force.

Joe R. Reeder, a West Point graduate and Army officer, was the 14th Under Secretary of the Army from 1993-97.

Togo D. West, Jr. was Secretary of the Army from 1993 to 1998, and Secretary of Veterans Affairs from 1998-2000. He has also served as General Counsel of the Departments of Defense and the Navy. Secretary West was commissioned a second lieutenant in the U.S. Army.

SUMMARY OF ARGUMENT

In complying with President Truman's command to end segregation, the military fought not only entrenched racial attitudes within its ranks, but also a sometimes hostile response by the civilian world that had powerful Congressional support. Nevertheless, recognizing that segregation was incompatible with a successful fighting force and the American ideals for which it fought, after World War II the military leadership implemented voluntary integrative policies that have achieved a level of diversity which, while still insufficient in certain areas, is largely unparalleled elsewhere in our society. In carrying out this mission, however, the military has not merely reflected societal preferences or limited its actions to compliance with court orders.

One of these voluntary integrative policies was the establishment of integrated Department of Defense schools, which was a direct response to the refusal of surrounding communities to provide such facilities. Even before this Court's decision in *Brown*, the military determined that providing a fully integrated environment for its soldiers included providing a fully integrated education to their children. The mili-

tary's choice to adopt this voluntary integrative measure has been extraordinarily successful. In addition to increasing our national security through a diverse, motivated, and dedicated fighting force, the military has created an academic environment that demonstrably benefits children of all races. The Department of Defense schools are among the most racially integrated of any in the country and, not coincidentally, have the very highest levels of achievement for minority students.

The experience of the military in creating a diverse fighting force, and in voluntarily establishing integrated schools that have resulted in extraordinary levels of overall and minority achievement, demonstrate the compelling interest in maintaining and promoting integration in elementary and secondary education. Ever since *Brown*, this Court has repeatedly stressed the overriding benefits of an integrated education. Contrary to the contentions of petitioners and their amici, the compelling governmental interest in securing those benefits does not suddenly become less than compelling merely because they are not imposed forcibly through a court order. Government officials should be able voluntarily to use those narrowly-tailored means which, in their considered judgment, are needed to secure the benefits of an integrated education for all children.

ARGUMENT

I. THE HISTORY AND EXPERIENCE OF THE U.S. MILITARY SHOWS THE IMPORTANCE OF VOLUNTARY MEASURES TO PROMOTE RACIAL INTEGRATION IN PUBLIC EDUCATION.

This Court has previously heard, credited, and relied on the judgment of former military officials that promoting racial diversity in the officer corps and training academies is a compelling and necessary governmental interest. *See Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003). As the Court noted, continuing racial disparities in the military and in the civilian arena have necessitated the use of race-conscious measures

by the military to ensure racial diversity in the officer corps: "[t]o fulfill its mission, 'the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.'" *Id.* (quoting Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* ("Becton Br.") at 29) (emphasis in original). The Court credited the judgment of former military officials that employing such measures is "essential to the military's abilities to fulfill its princip[al] mission to provide national security." *Id.* (citation omitted).

This integrative mission, however, has never been limited to the officer corps. Nor has it been limited to simply ceasing overt discriminatory policies or complying with court orders. To the contrary, and despite attempts by some to halt such efforts, since World War II the military has also taken voluntary measures to increase its own diversity and to combat the effects on military families of racial isolation in the civilian sphere, including in public education. Those measures were, and continue to be, critical to the military's overriding goal of building and maintaining a cohesive, unified, and motivated fighting force.

Indeed, the military places special emphasis on the education of its members and their children. For example, the Army considers it "imperative" to promote the continuing personal and professional development of its soldiers and their children. The Army also deems it imperative to address the unique individual needs of military dependent students. *See* Army Families Online, *Army Well-Being, Education and Development* (http://www.armyfamiliesonline.org). The Air Force, Marines, and Navy have similar commitments. *See* U.S. Air Force, *Air Force Strategic Plan 2006-2008*, at 5 (http://www.af.mil/shared/media/document/AFD-060919-008.pdf); U.S. Marine Corps, *Education* (http://www.usmc-mccs.org/education/fl/Index.cfm); U.S. Navy, *Staying the Course: A Commitment to Children* (http://www.

news.navy.mil/search/display.asp?story_id=8685). The reasons are clear: ensuring quality education for servicemembers and their children is integral to attracting and retaining dedicated and motivated personnel. As the Navy puts it, "[w]e recruit [s]ailors but we retain families." *Id.*

A. Since World War II, the Military Has Engaged in Voluntary Efforts to Integrate Both Its Ranks and the Education Provided to Dependent Children.

The idea that the military should act voluntarily to ensure racial integration did not come without resistance from both inside the military and from some in Congress. President Truman's Executive Order 9981, the official end to segregation in the United States military, was signed in 1948, years before this Court overruled the "separate but equal" doctrine in *Brown*. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (Jul. 26, 1948). But that Order's end of officially segregated units did not mean that the military was fully integrated or that equal opportunity for all service members was guaranteed. The Order placed integration in the hands of military commanders, and granted them the discretion to carry it out as they deemed appropriate. What commanders initially deemed appropriate was not necessarily rapid integration. For example, in 1951 the Air Force claimed that its implementation of Executive Order 9981 could not interfere with local custom. *See* Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, at 479 (1980) (hereinafter "*Integration of the Armed Forces*"). That same year, the Army Chief of Staff defended the Army's practice of maintaining large training camps in localities that openly discriminated against black soldiers because the Army had "no control over nearby civilian communities." *Id.*

Some in Congress also attempted to limit the effect of Executive Order 9981 to simply removing overt official segregation. For example, Senator Richard B. Russell of Georgia proposed an amendment to the draft law, which had

come up for renewal in 1950. *See* 100 Cong. Rec. 8412 (1950). That amendment would have allowed "inductees and enlistees, upon their written declaration of intent, to serve in a unit manned exclusively by members of their own race." *Integration of the Armed Forces*, *supra*, at 389. In other words, the Russell amendment would have permitted servicemembers to choose voluntarily whether they would serve with servicemembers of other races. While this proviso, in the eyes of some, might have removed official discrimination by relying instead on the voluntary preferences of servicemembers, it would not have embodied the integrative purpose of President Truman's Order or the military necessity that prompted that order. Though the amendment was ultimately defeated on the Senate floor, 100 Cong. Rec. 9074 (1950), it cleared the Senate Armed Forces Committee with the members' unanimous approval. *Id.* at 8412. Members of the House of Representatives also challenged the military's authority to implement other voluntary integrative measures in carrying out Executive Order 9981. When a later DoD directive authorized officers to prohibit personnel from patronizing businesses that practiced discrimination,[2] the head of the House Armed Services Committee introduced a bill that would have made implementing this directive a court martial offense. *See Integration of the Armed Forces*, *supra*, at 551; *see also* H.R. 8460, 88th Cong. (1963).

Notwithstanding the lack of enthusiasm of some in Congress and in its own ranks, by the early 1950s the military proceeded voluntarily to fully integrate its ranks even in the absence of a court order or legal requirement to do so. *See* Bernard McNalty & Morris MacGregor, *Blacks in the Military—Essential Documents* 314-15 (1981) (hereinafter *"Blacks in the Military"*). This necessarily included assignments and reassignments necessary to avoid segregation. *See*, *e.g.*, *id.* at 299-309. Thus, whereas two-thirds of black

---

[2] Dep't of Defense Directive 5120.36 (Jul. 26, 1963).

Air Force personnel were assigned to majority-black units in 1949, by 1954 no majority-black units remained anywhere in the military. *Id.* at 299-300.

The critical benefits to national security of a fully integrated fighting force have already been presented to, and accepted by, this Court. *See Grutter*, 539 U.S. at 331; Becton Br. at 12-13; Dep't of Defense Directive 1350.2, § 4.4 (Aug. 18, 1995) (describing plans to increase diversity as a "military necessity" that is necessary for "combat readiness and mission accomplishment"). The military's ongoing efforts to maintain and promote diversity have proved very successful, as the military remains one of the most integrated institutions in American society. In fact, the overall racial composition of the military is very similar to that of the general U.S. population, although disparities between enlisted personnel and the officer corps still exist. *See* Dep't of Defense, *Population Representation in the Military Services Fiscal Year 2004*, at iii-iv (May 2006) (http://www.defenselink.mil/prhome/poprep2004/download/2004report.pdf).

But the military's voluntary efforts at integration involved more than just personnel policies. Together with integration of its ranks, the armed services also integrated base housing after 1948. *See, e.g.*, Air Force Letter 35-3 (May 11, 1949). In addition, the military began voluntary desegregation of the schools operated for military dependents even before the *Brown* decision was rendered. *See Integration of the Armed Forces*, *supra*, at 490.

The desegregation of schools already operated by the Department of Defense ("DoD") was relatively uncomplicated. Though the DoD had long operated schools for dependents in the United States, the DoD schools in Japan and Germany were established after the end of World War II and had always been integrated. *Id.* The DoD-operated schools in the United States were fully integrated by the fall semester of 1953, before the *Brown* decision. *Id.*

But integrating the schools operated by local governments for military personnel was not so simple. Many state governments and their Congressmen protested that operating integrated schools would violate state laws. *Id.* at 492-93 (citing Letter from Rep. Arthur Winstead to Charles Wilson, Secretary of Defense (Feb. 18, 1954)). The military, however, was not content simply to yield to these local officials where the education of military dependents was at stake. In January 1954—before this Court decided *Brown*—the Department of Defense ordered the rapid integration of these schools. *See* Memorandum from Charles Wilson, Secretary of Defense to Joint Chiefs (Jan. 12, 1954), *reprinted in Blacks in the Military*, *supra*, at 315. The DoD gave base commanders a short September 1955 deadline for reaching agreement with local governments to desegregate schools serving military dependents. *Id.* Should no agreement to desegregate be reached, DoD would voluntarily provide integrated education facilities of its own for its servicemembers' children. *See id.* In some cases, the DoD did just that, when local governments refused to comply. *Integration of the Armed Forces*, *supra*, at 492-96. By 1956, the military had not only integrated hundreds of school classrooms, it had also integrated classes conducted by local universities for military personnel, which were voluntarily attended by servicemembers in off-duty hours. *Id.* at 495-96

In sum, although the military did not fully embrace the mission until after World War II, it came to understand the critical need for voluntary measures to ensure and maintain diversity and integration not only in its ranks but also in the education provided to its dependents. The military has not been content simply to accept prevailing societal preferences in this regard. Out of military necessity, it has not allowed servicemembers to choose racially isolated units. And when faced with recalcitrant local governments, the military voluntarily established its own schools rather than subject its dependent children to racially isolated schools.

B. The DoD Schools Demonstrate the Significant Benefits of Integrated Education.

One result of these voluntary efforts by the military to achieve integration in the face of local opposition was the expansion of the Department of Defense schools, which educate children of military members who serve overseas and those who reside on military bases stateside. *See* Claire Smrekar, et al., *March Toward Excellence: School Success and Minority Student Achievement in Department of Defense Schools* at ii (Sept. 2001) (hereinafter "*March Toward Excellence*"); Congressional Budget Office, *Budget Options for National Defense* 86 (Mar. 2000) (domestic DoD schools are "mainly a historical accident, dating to the time when segregated public schools in the South did not adequately serve an integrated military"). DoD schools now enroll more than 104,000 students at 223 schools, which makes the DoD system roughly the same size as the public school system in Charlotte-Mecklenburg, North Carolina. *See March Towards Excellence*, *supra*, at ii; *see also* Dep't of Def. Educ. Activity, *Facts 2003* (http://www.dodea.edu/communications/dodeafacts.htm). This school system, perhaps as much as any other in the Nation, exemplifies the benefits of, and compelling governmental interest in, a fully integrated educational environment.

The DoD schools are among the most racially diverse of any school system in the country. Approximately 54% of the students enrolled in DoD schools are members of a minority group. *See* Dep't of Def. Educ. Activity, *An Overview* (June 2004) (http://www.dodea.edu/aar/2004/students.htm). Of that 54%, approximately 18% of the students are African-American, 11% are Hispanic, 14% are bi- or multi-racial, 7% percent are Asian, and 2% are classified as other. *Id.* Because the military is fully integrated across geographic areas, the DoD schools are integrated as well, with each school having approximately the same racial makeup. *See id.*; *see also* Charles Brown, *Relatively Equal Opportunity in*

the Armed Forces: Impacts on Children of Military Families 8 (draft Jan. 2006) (on file with counsel for *amici*).

By contrast, the average African-American or Hispanic student enrolled in a civilian school attends a school in which only a third of students are white or Asian, with many schools experiencing extreme racial isolation. *See* Brown, *supra*, at 9 & Table 3. Whereas 41% of African-American civilian students attend schools that are less than 20% white or Asian, there are *no* African-American students attending such racially isolated schools in the DoD system. *See id.* The average white civilian student attends a school where 81% of his or her fellow students are white. *See* Gary Orfield & John T. Yun, *Resegregation in American Schools* 15 (1999). This is a very different experience from that of the average white DoD student, who attends a school where slightly less than half of his or her fellow students are white.

The educational achievement of students attending DoD schools, and particularly minority students, is extremely high, notwithstanding significant challenges faced by these students. Eighty percent of DoD students are children of enlisted parents, who often lack college degrees and earn incomes at or near the national poverty line. *See March Toward Excellence*, *supra*, at ix. As can be expected of military families, student transience is very high at DoD schools. The average student turnover rate at DoD schools is 35% each school year, which is similar to the rate experienced by inner city schools. *Id.* at 44. Yet despite relatively low parental incomes and high student population turnover, the DoD students' reading, writing, and mathematics scores are consistently among the highest in the nation. *See* Dep't of Def. Educ. Activity, *National Assessment of Educational Progress 2000-2003 Score Rankings* (http://www.dodea.edu/aar/2004/NAEP.htm). If the DoD school system were a state, its 1998 scores for all students would place it within the top two school systems in the nation. *March Toward Excellence*, *supra*, at viii-ix. In 2005, DoD students performed in

the top eight in the nation, as compared with the states, in all categories on the National Assessment of Educational Progress ("NEAP"). *See* Dep't of Def. Educ Activity, *News Releases* (Oct. 25, 2005) (http://www.dodea.edu/communications/news/releases/102805_math.htm *and* http://www.dodea.edu/communications/news/releases/102805_reading.htm).

While the overall statistics are impressive, the achievement of minority students at DoD schools is nothing short of superb. As compared to achievement for students in each of the states, the reading, writing, and mathematics scores of the African-American and Hispanic students within the DoD system are consistently among the top three nationwide, with minority DoD students in Grade 8 placing first in the nation in both reading and mathematics on each NEAP test since 2000. *See id.* Other scores are just as extraordinary: in 2005, for example, African-American DoD students in Grade 4 placed first and third in the nation, respectively, in reading and mathematics on the NEAP. *Id.*

To be sure, there are certain characteristics of DoD schools and military families that account for some of the achievement differences, including school resources,[3] higher parental achievement, and a greater family emphasis on education. *See March Toward Excellence*, *supra*, at 33; Claire Smrekar

---

[3] In 2000, the average civilian school system spent an average of $7,682 per student, whereas the DoD schools spent an average of $9,503. *See* Dep't of Def. Educ. Activity, *Budgets* (2000) (http://www.dodea.edu/aar/2000/budget.htm). But while DoD per-student spending is higher than the national average, it is less than what is typically spent in large U.S. systems with comparable minority student populations. *See March Toward Excellence*, *supra*, at x. Moreover, civilian school systems often receive additional support through state, federal, and private sector grant programs. *See* Dep't of Def. Educ. Activity, *Budgets* (2000). This additional financial support, which is not reflected in the published per student costs, may represent a significant percentage of a civilian school system's budget. *Id.*

& Debra Owens, *It's a Way of Life For Us: High Mobility and Achievement in Department of Defense Schools*, 72 J. Negro Educ. 173 (Winter 2003). But even accounting for all available socioeconomic and resource variables, there remains a significant unexplained variation in the achievement of African-American DoD students as compared to their civilian counterparts. According to one detailed study, even when such variables are factored in, between one quarter and one third of the achievement gap remains unexplained. *See* Brown, *supra*, at 21. By contrast, available socioeconomic and resource variables appear to account for all of the civilian-DoD achievement differentials for white students and almost all of the differentials for Hispanic students. *See id.* In other words, an African-American student in a DoD school will perform better than his or her similarly-situated civilian counterparts, even when all available socioeconomic variables are taken into account.[4]

It may be that the beneficial effects of reducing racial isolation cannot be precisely quantified, and that these effects will not be experienced by all students or at all times. Nevertheless, the experience of DoD schools provides a persuasive—indeed, compelling—case for the benefits of an integrated education, particularly for African-American students. Established in large part through the military's voluntary integrative efforts some fifty years ago, the diverse DoD schools have continued to perform better than their civilian counterparts. Indeed, some military members are so committed to having their children attend these schools that they will go to great lengths to ensure that attendance. *See* Fredreka Schouten, *Military Schools Producing Army of Solid Performance*, USA Today (Mar. 31, 2004) (describing an army

---

[4] These educational benefits, moreover, are in addition to the numerous other significant social, economic, and community benefits that result from integrated schools, which will be addressed by respondents and by other *amici curiae*.

major who purchased a recreational vehicle and parked it on base as living quarters so that his children could attend base schools).

II. PROMOTING AND MAINTAINING RACIAL INTEGRATION IN ELEMENTARY AND SECONDARY SCHOOLS IS A COMPELLING GOVERNMENTAL INTEREST.

Ever since *Brown*, this Court has consistently held that racially isolated public schools are particularly detrimental to minority students, and that racially integrated schools are beneficial to all students. Yet while they concede the legitimacy of governmental efforts to promote and maintain racial diversity in elementary and secondary schools,[5] petitioners and their amici steadfastly refuse to recognize that interest as a compelling one, except in the narrow instance where integration is achieved forcibly through a court order. That cramped view of the law squares neither with this Court's precedents nor human experience. Indeed, the experience of the military and its own schools since World War II demonstrates why the goal of voluntary racial integration should not be relegated to second-class status.

---

[5] *See* U.S. Br., No. 05-908, at 27 ("the interest in reducing, eliminating, or preventing minority group isolation in public schools is a legitimate and important purpose"); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005) ("[e]ven the Parents' expert conceded that * * * 'integration is a desirable policy goal.'"); *McFarland* v. *Jefferson Co. Pub. Schs.*, 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) (finding the benefits of racial tolerance and understanding as important and laudable as those approved in *Grutter* and noting that plaintiffs did not challenge the evidence regarding those benefits); *id.* at n.39 (finding that the Board of Education has "valid reasons for believing race conscious assignment policies may aid student performance" and noting that "plaintiffs produced no contrary evidence").

In *Brown*, the Court identified two different harms arising from racial segregation in public schools. The Court embraced a lower court's finding that "'[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. *The impact is greater* when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.'" 347 U.S. at 494 (citing factual findings; emphasis added). Thus, the Court's reference to the harms of "segregation" embodied more than just state-sanctioned separation: while the harms are greater when there is *de jure* segregation because of the imposed stigma of inferiority, the harms to children exist regardless of how the segregation was achieved. Likewise, the tangible and intangible benefits of an integrated education exist equally for all students regardless of whether those benefits were secured through a court order or voluntarily. *See, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) (it is "clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom'") (citations omitted).

After *Brown*, this Court made clear that the judiciary may impose narrowly-tailored race-conscious measures to remedy *de jure* segregation. *See, e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-25 (1971). Contrary to petitioners' arguments, however, the interest in preventing and eliminating the harms of racially isolated schools, and achieving the benefits of integration, does not suddenly become less than compelling simply because it is not effectuated through a court order. It is true that *courts* lack remedial competence and power to effectuate integration measures where there is no finding of intentional segregation, or where all vestiges of *de jure* segregation have been eliminated. But just because integrative measures are not constitutionally required, that does not mean that the elected branches of government are constitutionally forbidden from pursuing such measures voluntarily. Given that there is a

compelling interest for courts to use all appropriate measures to remedy the harms to children caused by unconstitutional segregation, there is an equally compelling basis for school officials to similarly employ narrowly-tailored measures on a voluntary basis to prevent and rectify those same harms.

Indeed, at the same time that it confirmed the limits of judicial powers in this area, this Court recognized that the powers of the political branches are not so limited:

> School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of the school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Swann, 402 U.S. at 16; *see also Washington*, 458 U.S. at 474 ("[I]n the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.").

In deference to the greater powers and competence of elected officials, the Court has consistently invalidated overly intrusive judicial remedies for segregation. *See, e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992) ("Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) ("This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through their elected representatives."). That same judicial restraint counsels strongly against a holding that furthering racial integration in elementary and secondary schools is not a compelling governmental

interest, such that governments are *never* justified in using even narrowly-tailored race-conscious measures to achieve it.

The experience of the military shows the importance of allowing governmental officials to pursue voluntary integrative measures, not merely for their own sake but for the acknowledged benefits that will result. The Court has already recognized that race-conscious measures to increase diversity in the armed forces are "essential to the military's ability to fulfill its princip[al] mission to provide national security." *Grutter*, 539 U.S at 331 (citation omitted). In determining unit assignments, military commanders do not acquiesce to perceived societal preferences where those preferences conflict with the critical objective of maintaining a diverse, cohesive, and unified, fighting force. *Cf. Integration of the Armed Forces*, *supra*, 389-90, 545 (noting efforts to require military to accept individual segregative preferences).

The same is true for the education of military dependents. The military pursued voluntary integrative measures because they were deemed important to its core mission, to the point of establishing its own integrated schools in defiance of surrounding local preferences. The military did this because leadership recognized that it could not fulfill its commitment to a diverse fighting force if that commitment ended when servicemembers were off-duty. Ensuring a quality, integrated education for its dependents is a top military priority because it promotes servicemembers' motivation and dedication, fosters a sense of true equality, and helps retain key military personnel. Moreover, given that many military officers and enlisted members come from the ranks of military families, exposing military dependents to the benefits of a diverse, quality education will help prepare them as future leaders of the integrated military.

The fully integrated schools of the military have resulted in demonstrated benefits to all the dependent children they serve, and particularly African-American children. Achiev-

ing that goal is no less compelling than the goal of increasing diversity in the officer corps, which this Court has already recognized as a compelling governmental interest. Neither the military, nor the surrounding communities in which most military children are educated, should be disabled from employing whatever narrowly-tailored measures may be needed, in the considered judgment of governmental officials, to accomplish that compelling objective.

CONCLUSION

For the foregoing reasons, and those set forth in the briefs of respondents, the judgments of the courts of appeals should be affirmed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

* Counsel of Record

Counsel for Amici Curiae